BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION **Complainant** **v.** **CASCADE NATURAL GAS CORPORATION,** **Respondent**	**DOCKET PG-230800** **MOTION TO DISMISS OF INTERVENOR SAPPHIRE GAS SOLUTIONS LLC**

MOTION TO DISMISS OF INTERVENOR SAPPHIRE GAS SOLUTIONS LLC

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I. INTRODUCTION

1 Sapphire Gas Solutions LLC ("Sapphire"), as an intervening party in this proceeding, moves to dismiss each of ten causes of action brought by the Washington Utilities and Transportation Commission ("Commission") in its Complaint against Cascade Natural Gas Corporation ("Cascade").

II. SUMMARY OF ARGUMENT

2 The Complaint brings ten causes of action against Cascade for alleged violations of pipeline safety rules promulgated by the Commission at chapter 480-93 WAC *et seq.* and the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA") regulations at 49 C.F.R. parts 191, 192, and 193. Each of the causes of action in the Complaint should be dismissed as a matter of law. First, the requirements of 49 C.F.R. part 192 and WAC 480-93-180 as alleged in seven of the causes of action are inapplicable to mobile temporary LNG facilities. LNG facilities are regulated separately under 49 C.F.R. part 193. Second, in two causes of action the Complaint alleges violations of law premised upon new, *post hoc* interpretations of unambiguous regulations, in violation of due process principles. Third, mobile temporary LNG facilities used for service maintenance of gas pipeline systems are subject only to the applicable requirements in NFPA-59A-2001 under 49 C.F.R. § 193.2019(a), so the notice provision alleged in one cause of action is inapplicable as the provision is not a requirement in NFPA-59A-2001 and, even if applicable, the notice provision is a one-time rather than continuing obligation.

III. FACTUAL BACKGROUND

3 The allegations in the Complaint relate to a mobile temporary LNG facility operated by Sapphire and connected to Cascade's part 192 pipeline for service maintenance for Cascade's customers.

IV. ARGUMENT

A. All causes of action relying on WAC 480-93-180 must be dismissed because that section is inapplicable to mobile temporary LNG facilities.

4 The Commission should dismiss seven of the causes of action[1] (the "Section 180 Causes of Action") because they are based on the incorrect application of gas pipeline regulations under 49 C.F.R. part 192 to LNG operations regulated under 49 C.F.R. part 193. The Commission incorporates, by reference, the federal regulations for both gas pipelines in part 192 and the federal regulations for LNG facilities supplying gas pipelines in part 193. WAC 480-93-999. LNG facilities supplying gas to part 192 pipelines are defined as pipeline facilities under the federal regulations adopted by the Commission, but are regulated separate from the gas pipelines under a different part of the Code with distinct requirements. The Section 180 Causes of Action each assume that the requirements applicable to the gas pipeline system under part 192, including the management of pipeline plans and procedures, also implicate the plans and procedures for operating an LNG facility. That approach is unsupported by the plain text of WAC 480-93-180 and the incorporated federal regulations.

[1] Third, fourth, fifth, sixth, seventh, ninth, and tenth Causes of Action.

5 Cascade and its contractors have no obligation under WAC 480-93-180 to incorporate into Cascade's gas pipeline manual the procedures for operating the separately regulated and separately operated LNG facility. Moreover, section 180 does not set operating requirements for LNG facilities.

1. The gas pipeline manual is for operating procedures and plans that are specific to gas pipelines, not LNG facilities.

6 WAC 480-93-180(1) does not require a pipeline operator to incorporate into its pipeline manual the plans and procedures of an LNG facility. WAC 480-93-180(1) requires that gas pipeline companies "have and follow a gas pipeline plan and procedure manual (manual) for operation, maintenance, inspection, and emergency response activities that is specific to the gas pipeline company's system." The manual must include plans and procedures for meeting the "applicable requirements" in 49 C.F.R. parts 191 and 192 and 480-93 WAC and "any plans or procedures used by a gas pipeline company's associated contractors." Seven causes of action rely on treating LNG facilities as part of the gas pipeline, but they are not part of the pipeline and those plans and procedures are not part of the "applicable requirements" referred to in WAC 480-93-180(1). The federal regulations adopted by the Commission differentiate gas pipelines and LNG facilities and provide wholly different requirements for each. The PHMSA regulations adopted by the commission regulate LNG facilities under part 193, not part 192. And importantly, part 193 only applies to LNG facilities that are connected to part 192 pipelines, so PHMSA necessarily considered the interplay of LNG facilities with regulated pipelines when it chose to create distinct requirements for pipeline-connected LNG facilities and omitted the requirements that the Commission now asserts.

7 The operating procedure requirements for LNG facilities connected to gas pipelines are found in 49 C.F.R. § 193.2503, or in the case of mobile temporary LNG facilities, the applicable sections of NFPA-59A-2001 which are incorporated at 49 C.F.R. § 193.2019(a). Regardless of which part 193 provisions apply to the LNG facility, the rule structure with separate and distinct operating requirements for LNG facilities, including distinct plans and procedures, demonstrates that the LNG facility is not part of the operation of a gas pipeline and the LNG facility's plans and procedures should not be incorporated into the gas pipeline manual. The seven causes of action must be dismissed because they disregard the distinction. The gas pipeline manual described in WAC 480-93-180 is specific and unique to the pipeline and should not include plans and procedures for a separately regulated and operated mobile temporary LNG facility.

2. An LNG facility's plans or procedures are not the kinds of information relevant to a gas pipeline manual as described in WAC 480-93-180(1).

8 Treating a mobile temporary LNG facility as part of a gas pipeline operator's gas pipeline system is beyond the plain language of WAC 480-93-180 and creates ambiguity in its application. WAC 480-93-180(1) states that the pipeline operator must have and follow a manual covering "operation, maintenance, inspection, and emergency response activities that is specific to the gas pipeline company's system." Mobile temporary LNG facilities are not part of the gas pipeline company's system and do not address the operation, maintenance, inspection or emergency response for the gas pipeline system. The procedures for operating an LNG facility do not fit the purpose of the gas pipeline manual and plans and procedures for the operation of a mobile temporary LNG facility are not "specific to the gas pipeline." WAC 480-93-180(1).

9 It is also clear from the language in WAC 480-93-180(3) that LNG facility plans and procedures are not intended to be included in the gas pipeline manual. That subsection provides examples of items to incorporate into the gas pipeline manual, including "instructions on how to maintain a regulator or rectifier, conduct a leak survey or conduct a pressure test." WAC 480-93-180(3). Where specific and general terms are used together in sequence, the specific terms modify or restrain the application of the general terms, and can be used to interpret the rule's meaning. *Silverstreak, Inc. v. Washington State Dep't of Lab. & Indus.*, 159 Wash. 2d 868, 882 (2007). Thus the general requirement to include plans and procedures used by contractors can be understood to mean those specific plans and procedures for the operation and maintenance of the pipeline and its components. It does not include plans and procedures of equipment or contractors that are unrelated to the operation and maintenance of the pipeline. Suggesting otherwise would lead to absurd results, causing regulated pipeline entities to produce and maintain a boundless manual that is needlessly extensive, rather than one focused on the relevant items that are specific to the pipeline. Limiting the scope of applicable plans and procedures to pipeline-specific items is also consistent with the requirements in 49 C.F.R. parts 191 and 192, and chapter 480-93 WAC, which each include specific requirements for the operation and maintenance of a pipeline.

3. Plans and procedures that must be incorporated into the gas pipeline manual do not include inapplicable regulations referenced in WAC 480-93-999.

10 WAC 480-93-180(1) requires the gas pipeline company to include in its pipeline manual plans and procedures for all *applicable* requirements of parts 191 and 192 and chapter 480-

93 WAC. WAC 480-93-180(1) does not require a gas pipeline company to incorporate plans or procedures from a part 193 facility. Chapter 480-93 WAC has an incorporation subchapter, 480-93-999, that incorporates a number of regulations by reference, including 49 CFR part 193. Unless the Commission interprets the requirements in WAC 480-93-180(1) to also include all of the referenced requirements in WAC 480-93-999, there is no requirement for any mobile temporary LNG facility plans or procedures to be incorporated into the gas pipeline company's manual. And such an interpretation also fails because an inclusion by reference within a reference should not be read to expand the section 180 pipeline manual requirements to also include the LNG facility rules found in part 193. Interpreting WAC 480-93-180(1) in that way would ignore the plain language, which is directed to gas pipelines, and would render superfluous the duplicative references to the requirements of parts 191 and 192 which are explicitly referenced in WAC 480-93-180(1) but also incorporated by reference in WAC 480-93-999.

11 The presumption against surplusage says that a statute or rule should not be interpreted in a way that renders any of its provisions superfluous or in a way that creates unnecessary overlap between the provisions. *Applied Indus. Materials Corp. v. Melton*, 74 Wash. App. 73, 79 (1994) ("Courts are bound to accord meaning, if possible, to every word in a statute."). Reading WAC 480-93-180(1) to include all of the adopted references in WAC 480-93-999 violates the presumption against surplusage because WAC 480-93-180(1) already lists 49 C.F.R. parts 191 and 192 as rules adopted by reference and WAC 480-93-999 duplicates the incorporation of these parts by another reference. If the intent of WAC 480-93-180(1) was to include the requirements of all adopted references in WAC 480-93-999, it would not need to independently list part 191 and part 192.

12 Instead, the "applicable requirements" of chapter 480-93 WAC, as referenced in WAC 480-93-180(1), refers to WAC 480-93-015 to 480-93-250, which have independent, specific requirements for gas pipeline operations and maintenance, including requirements for odorization, siting, welding, valves, corrosion control, casing of line pipes, pipeline markers, pressure regulation, service regulators, adjusting maximum allowable operating pressures, testing, gas leak investigations, leak evaluation, reporting, maintenance, and operation. These gas pipeline requirements are consistent with or complement the federal requirements in 49 C.F.R. part 192 and are specifically applicable to the gas pipeline. These are the "applicable requirements" of chapter 480-93 WAC that WAC 480-93-180(1) intended to incorporate.

13 The Section 180 Causes of Action must be dismissed because they purport to apply gas pipeline regulations under part 192 to LNG operations that are separately regulated under part 193 and the plain language of WAC 480-93-180 does not support the idea that an LNG facility plan or procedure should be incorporated into a pipeline manual.

B. Causes of action relying on section 11.4.5.2(c) of NFPA-59A-2001 must be dismissed because that section is not incorporated into the applicable regulations.

14 The second and eighth causes of action should be dismissed because they are based on alleged violations of portions of NFPA-59A-2001 that are not incorporated into the part 193 rules for mobile temporary LNG facilities. 49 C.F.R. § 193.2019(a). Both causes of action are based upon requirements in NFPA-59A-2001 section 11.4.5.2(c). The NFPA-59A-2001 sections applicable to mobile temporary LNG facilities are identified in NFPA-

59A-2001 section 2.3.4. Section 2.3.4 incorporates by reference specific sections of NFPA-59A-2001, essentially creating a small subset of NFPA-59A-2001 requirements that are applicable to mobile temporary LNG facilities. Section 11.4.5.2(c) is not one of those referenced sections so it is not a requirement for mobile temporary LNG facilities operating under NFPA-59A-2001.

1. The Complaint alleges a requirement that was created after the fact.

15 The Complaint presents NFPA-59A-2001 section 11.4.5.2(c) as a requirement without addressing why the requirement is not listed in section 2.3.4. The Commission is aware that NFPA-59A-2001 does extend the requirements of section 11.4.5.2(c) to mobile temporary LNG facilities and, following the incident, Commission staff sought to expand part 193 to include section 11.4.5.2(c) from the NFPA standard. Commission staff sought an interpretation from PHMSA to support this reinvention of the regulation. The resulting interpretation is insufficient under Washington law to support a cause of action under section 11.4.5.2(c) for a mobile temporary LNG facility. The PHMSA interpretation letter (the "2024 Interpretation") asserts that NFPA's failure to include section 11.4.5.2(c) in the requirements for mobile temporary LNG facilities was essentially a typographical error by NFPA and 11.4.5.2(c) should be considered incorporated into section 2.3.4 of NFPA-59A-2001—the section detailing mobile temporary facility requirements—even though it was not. PHMSA, *Interpretation Response #PI-23-0018*, Mar. 27, 2024. PHMSA's after the fact explanation and new changes to the unambiguous, plain language of an incorporated third party standard cannot be relied upon in this enforcement action because new requirements developed after the fact do not satisfy fundamental notions of fairness or due process.

2. Washington law does not allow agencies to retroactively enforce a change in position on a regulation.

16 The starkness of PHMSA's change in direction and the resulting unfairness and due process concerns are further illustrated by PHMSA's history of rulemaking and commentary on the use of NFPA standards for the operation of mobile temporary LNG facilities supplying gas pipelines. The agency has relied on NFPA-59A-2001 for more than two decades and has consistently stated that mobile temporary LNG facilities providing service to part 192 pipelines must comply with the 2001 version of the NFPA standard. The agency has gone further and rejected the proposition of substituting alternative requirements from other editions of the NFPA Standard, including updated versions with more stringent, but conflicting requirements. *E.g.* PHMSA, *Interpretation Response #PI-20-0005*, Apr. 23, 2020. PHMSA has consistently advised that, "[p]art 193 incorporates NFPA-59A-2001, therefore you must comply with the requirements in NFPA-59A-2001." *Id.* This was the agency's plain and unambiguous interpretation of the requirements during the time period underlying the allegations and for nearly twenty years prior. 69 Fed. Reg. 11330 (2004).

17 Expanding the requirements of a regulation after the fact does not satisfy due process, is manifestly unjust, and self-evidently unfair. *Silverstreak*, 159 Wash. 2d at 889 (it is a "manifest injustice" and "self-evidently unfair" for an agency to adopt a position and later deny the plain reading after a regulated entity's reliance). Prior to the 2024 Interpretation, Cascade and its contractors did not have fair notice that any other requirements applied to mobile temporary LNG facilities beyond those established by NFPA-59A-2001. PHMSA provided a new interpretation of the unambiguous meaning of the regulation only after the

Commission requested the change after the fact. The Commission may not now enforce a new interpretation of its regulations retroactively.

18 Under Washington law, the principle that regulations should not be enforced retroactively without fair notice is well established and grounded in both statutory and constitutional protections. There is a partial exception to the rule, but only in the case of statutes where the legislature has clearly and explicitly stated its intent for the application to be retroactive. *Graves v. Dunlap*, 87 Wash. 648, 655 (1915). The Washington Supreme Court has also held that where "ambiguity is lacking" in the text, an amendment to a statute or rule constitutes a substantive change in law and will not be retroactively applied. *In re F.D. Processing, Inc.*, 119 Wash. 2d 452, 462 (1992). This presumption against retroactivity is rooted in due process, which requires that regulated persons or entities have clear and advance notice of applicable legal requirements so they may conform their conduct accordingly.

19 Here, the Commission has not engaged in the process of rulemaking to promulgate a retroactive rule. There is also nothing in the organic statute giving clear instruction or powers to the agency to retroactively apply new regulations in this manner. Still, the Commission seeks to retroactively apply a new rule that was created outside of the traditional rulemaking process by relying on a novel interpretation of an unambiguous rule to change the plain meaning of that rule. The 2024 Interpretation is novel because PHMSA now rejects its prior position that mobile temporary LNG facilities supplying gas to part 192 pipelines must follow the requirements of NFPA-59A-2001 and instead takes the position that, in this instance, something other than NFPA-59A-2001 is required. Just as

rulemaking should not be enforced retroactively, so too should the Commission be barred from enforcing a novel interpretation retroactively.

3. Washington law does not allow agencies to enforce an interpretation letter without formal administrative rulemaking.

20 In addition, the cause of action should be dismissed because it relies upon an interpretive statement from PHMSA to change the unambiguous meaning of part 193. Under Washington law, interpretive statements issued by agencies have no legal or regulatory effect and "[a] person cannot violate an interpretive statement." *Washington Educ. Ass'n v. Washington State Pub. Disclosure Comm'n*, 150 Wash. 2d 612, 619 (2003). Instead of an enforcement mechanism, such interpretive statements are intended to, and beneficial only to the extent that, they help regulated entities understand how to comply with legal requirements and understand the agency's regulations "*before* the imposition of penalties." *Washington Educ. Ass'n*, 150 Wash. 2d at 618 (emphasis in original).

21 Here, the 2024 Interpretation by PHMSA was issued after the fact and contradicts the plain and unambiguous meaning of the agency's regulations. The 2024 Interpretation also contradicts the plain and unambiguous meaning of the third party industry standard adopted by the agency. Further, the 2024 Interpretation is a departure from PHMSA's existing policy and prior interpretations, which required strict adherence to the requirements in NFPA-59A-2001 and excluded all other versions of the NFPA standard. At the time of the events underlying these claims, regulated entities did not have fair notice of the agency's new position that something other than the 2001 edition of the NFPA standard was applicable; the regulation clearly states that the 2001 edition is incorporated by reference

and until 2024, the agency's interpretation letters plainly stated that only the 2001 edition was applicable. 69 Fed. Reg. 11330 (2004). Thus the Commission's reliance on the 2024 Interpretation is not allowed under Washington law because enforcement actions based on conduct occurring before the effective date of a regulation, or before the requirements were reasonably communicated, are impermissible.

4. Equitable estoppel requires dismissal.

22 The causes of action relying on the 2024 Interpretation must also be dismissed under principles of equitable estoppel. Cascade and its contractors did not have adequate notice that the agency had changed its longstanding position and that they were subject to additional requirements. Equitable estoppel prevents an agency from taking a contradictory position if inequitable consequences will result to the party relying upon the prior position. *Silverstreak*, 159 Wash. 2d at 887. The Washington Supreme Court described the five elements that must be established to obtain relief under principles of equitable estoppel:

> (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims, (2) the asserting party acted in reliance upon the statement or action, (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action, (4) estoppel is "necessary to prevent a manifest injustice," and (5) estoppel will not impair governmental functions.

Silverstreak, 159 Wash. 2d at 887 (*citing Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wash. 2d 738, 743 (1993)).

23 The five elements of equitable estoppel are satisfied here: (1) at the time of the facts underlying these claims, the agency's guidance for mobile temporary LNG facilities plainly articulated that operation of the facilities was permissible under NFPA-59A-2001 and no other version of the standard was relevant; (2) Cascade and it's contractors relied on the agency's position when it operated a mobile temporary LNG facility under NFPA-59A-2001; (3) if PHMSA and the Commission are now allowed to retroactively change the plain text of the regulation, Cascade would be subject to enforcement; (4) thus, estoppel is necessary to prevent the manifest injustice of enforcing new requirements retroactively; and (5) estopping the Commission here does not impair the Commission's ability to engage in rulemaking or to adopt interpretations that it may apply prospectively or from enforcing any of its other regulations, thus it does not otherwise impair the Commission's functions. Accordingly, the Commission must be estopped from enforcing the new requirements on Cascade for the actions alleged here.

24 The Complaint's second and eighth Causes of Action must be dismissed because the NFPA standard cited is inapplicable to mobile temporary LNG facilities and post-incident revisions to the requirements did not provide fair notice, violate due process, and must otherwise be equitably estopped.

C. **The first cause of action must be dismissed because the rule to notify is waived by 49 C.F.R. § 193.2019(a), or in the alternative, the cause of action should be limited to a single, noncontinuing violation.**

25 The first cause of action alleging failure to comply with a notice requirement must be dismissed because the rule does not require notification be provided to the state agency if the facility complies with NFPA-59A-2001. 49 C.F.R. § 193.2019(a). In the alternative, notice is only required for installation—not operation—so the rule does not support a continuing violation for each day of operation, but rather one violation occurring at the time of installation. The Complaint alleges that Cascade or its contractor failed to notify the Commission 54 times for the establishment and operation of the mobile temporary LNG facility, which is not the requirement in the rule.

1. The notice requirement for mobile temporary LNG facilities is waived by 49 C.F.R. § 193.2019(a).

26 The notice requirement is 49 C.F.R. § 193.2019(b) and is waived by 49 C.F.R. § 193.2019(a). In relevant part, the waiver rule states that operators of mobile and temporary LNG facilities for service maintenance of gas pipelines "need not meet the requirements of this part," meaning part 193, if the facilities comply with the applicable sections of NFPA-59A-2001. 49 C.F.R. § 193.2019(a). An unambiguous regulation is given its plain and ordinary meaning. *Silverstreak*, 159 Wash. 2d at 881. The language in 49 C.F.R. § 193.2019(a) waiving all other requirements in part 193 is unambiguous. The notice requirement in 49 C.F.R. § 193.2019(b) is a "requirement[] of this part" that is waived by operating under NFPA-59A-2001. The applicable sections of NFPA-59A-2001 do not require that any notice be provided to state agencies having jurisdiction over pipelines, and the Commission does not have any independent regulations requiring notice be provided prior to the installation of a mobile temporary LNG facility. Thus, by the plain reading of 49 C.F.R. § 193.2019(a), the first cause of action should be dismissed.

2. The notice provision does not support continuing violations.

27 In the alternative, the alleged violation of a notice requirement is a single violation and cannot be treated as a continuing violation with each day of operation treated as a new violation. The Complaint alleges that the Commission was not notified by Cascade or its contractor for "54 days of the location of portable LNG equipment" and that the "establishment and operation" of a mobile temporary LNG facility violated the notice rule 54 times. The Complaint misstates the rule. Notice is not triggered by the location of equipment, nor by the operation of the facility, but rather its installation. The requirement in 49 C.F.R. § 193.2019(b) says the state agency with jurisdiction over pipeline safety "must be provided with a location description for the installation at least 2 weeks in advance…." 49 C.F.R. § 193.2019(b). The duty to comply is triggered by the act of "installation" of the portable LNG equipment, or in other words the connection of the facility to the pipeline.

28 Part 193 uses the word "installed" seven times and "installation" eight times, each as a verb and never as a noun; part 193 uses the term "facility" when referring to the physical system. *See* 49 C.F.R. part 193. It is clear from the text that the act of installation—connecting the mobile facility to the pipeline—is the relevant trigger, but it is also necessarily so because the mobile temporary LNG facility is not regulated by part 193 *until* it is connected to a pipeline. The act of installation does not include operation and use of the facility *after* installation. Whereas continuing verbs such as "operation" and "use" may cover multiple days and constitute daily violations if ongoing for multiple days, the act of installation occurs at a single point in time when the facility's connection to the pipeline is completed. Installation is not a continuing process that spans multiple days. Installation was not

occurring for 54 days; it occurred once. Thus any cause of action alleging a failure to provide notice of installation may only be alleged once as a single violation.

29 The Complaint alleges that Cascade established and operated the facility on 54 occasions. But establishment and operation are not events requiring notification under the rule. The mobile temporary LNG facility was not installed 54 times and so did not require 54 notices to the Commission. Thus the alleged failure to provide notice can occur at most on one occasion and the alleged continuing violation should be dismissed.

30 Part 193 unambiguously provides a waiver of all requirements in that part for mobile temporary facilities operating under NFPA-59A-2001. 49 C.F.R. § 193.2019(b) is within that part and is waived by operating under NFPA-59A-2001. Accordingly, the first Cause of Action should be dismissed for failure to state a claim or, in the alternative, limited to a single instance of violation.

V. CONCLUSION

31 The Complaint presents ten causes of action that should each be dismissed as a matter of law because the Complaint conflates part 192 requirements with the independent and distinct requirements in part 193 for LNG facilities that are connected to a pipeline and the Complaint misapplies pipeline requirements to an LNG facility that is not a gas pipeline. Accordingly, Sapphire requests that the Commission speedily dismiss all ten causes of action against Cascade.

Dated: July 1, 2025

Respectfully submitted,

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